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No. 09-1199

SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

SYLVIA BAPTE, et al.,

Petitioners,

—v.—

WEST CARIBBEAN AIRWAYS, NEWVAC CORPORATION, GO 2 GALAXY, INC., JACQUES CIMETIER, and ASEGURADORA COLSEGUROS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

JORGE A. DUARTE
Counsel of Record
JORGE A. DUARTE, P.A.
5975 Sunset Drive, Suite 601
Miami, Florida 33143
(305) 358-2400
jorgeaduartepa@hotmail.com

ANDREW T. TRAILOR
BRIAN H. POLLOCK
ANDREW T. TRAILOR, P.A.
8603 South Dixie Highway
Suite 303
Miami, Florida 33143
(305) 668-6090
andrewtrailor@attlawpa.com

Attorneys for Petitioners

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INTRODUCTION

Countries that participate in the Warsaw System and that signed the Montreal Convention seek, as a cardinal purpose, to achieve uniform rules governing claims arising from international air transportation. This includes the express right of a plaintiff to select where to file suit. In the instant, Respondents seek to have the doctrine of *forum non conveniens* ["*FNC*"] applied to defeat the right of a claimant to bring a Montreal Convention claim in a country such as the United States and to use *FNC* as an escape hatch for Respondents to avoid venue in the United States. This case demonstrates how the application of *FNC* undermines the treaty's goal of achieving uniformity in how claims arising from international air transportation are handled by signatory nations. The application of *FNC* in this action has resulted in the representatives of the passengers being dismissed to Martinique while allowing the crew members' claims to proceed in the District Court. In the end, allowing the application of *FNC* to override a claimant's choice of forum which redirects litigants to different parts of the world depending on where they are from, where they sat on the plane, or based upon the types of claims they seek to bring in suit, disrupts and frustrates the uniform handling of claims arising from international air transportation—undermining the cardinal purpose of the Warsaw System.[1] Neither is it

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[1] *See American Dredging v. Miller*, 510 U.S. 443, 444 (1994) (the doctrine of *FNC* "is most unlikely ever to produce uniform results").

lawful that a Respondent such as Newvac, whose home offices are located in Florida, can use the treaty to 'forum shop' by stipulating to liability and then seeking *FNC* dismissal to transfer the case to a foreign country for assessment of significantly reduced damages.

I. RESPONDENTS' STATEMENT OF THE CASE IS INACCURATE

Respondents' Statement of the Case and Facts can best be described as a rehash of failed arguments rejected by both Courts below. Despite the District Court's contrary findings, affirmed on appeal, Respondents resuscitate these failed arguments and present them to this Court as irrefutable factual evidence. *See Pierre-Louis v. Newvac Corp.*, 548 F.3d 1052, 1057 (11th Cir. 2009).

In their Statement of the "Relevant Facts", Respondents attempt to disavow their undeniable responsibility and to distance themselves from this air disaster that killed 152 passengers so as to justify the improper application of *FNC*. Respondents state:

> "Thus, contrary to the statements of the Petitioners, Newvac was not a 'clandestine airline' or the 'de facto operator' of WCA. *See* Petition at 3-4. Newvac simply was a small tour operator and could not and did not provide any pilot training or aircraft parts, airline control fees, or assert any control over WCA's flight operations or personnel."

(Opp. Brief, pp. 3-4.) The Eleventh Circuit explicitly rejected these same contentions when it affirmed the District Court's findings that Newvac assumed the role of "carrier":

> The district court properly concluded that because "Newvac *knowingly assumed the responsibility* to supply the aircraft and crew, and to otherwise conduct itself as a carrier, for the transportation of Globe Trotter's customers," it was a "contracting carrier" within the meaning of Article 39 of the Montreal Convention. The court correctly rejected Newvac's argument that because the actual passengers were not known to Newvac at the time it contracted with Globe Trotter, Newvac could not be a "contracting carrier" under the Convention. The Newvac-Globe Trotter contract clearly provided that Globe Trotter would procure passengers for the flights and tour packages that would be supplied by Newvac and that, once the passengers had been procured, Globe Trotter would forward their information to Newvac so Newvac could issue the relevant travel documents, including individual passenger tickets. Emphasis added.

Pierre-Louis, *supra*, fn. 6.

In sum, Respondents failed to accurately state the evidence to present themselves as disconnected from the operations of WCA; presumably to justify the application of *FNC*. Newvac's home office is in South Florida, its conduct as a carrier occurred in South Florida and that is where

Newvac should be tried. Respondents' representations of the "Facts" are inaccurate and all arguments based thereon should be disregarded.

II. THE RULE 60(b) MOTION

Respondents reference a Rule 60(b) Motion in their brief that is not at issue in the instant appeal. Shortly after the passengers were dismissed to Martinique on *FNC* grounds, the District Court denied *FNC* dismissal of the crew members' suits. That *FNC* ruling was so markedly different from the passengers' *FNC* ruling, that a Rule 60(b) Motion was filed. The Motion was denied and the Eleventh Circuit affirmed.

III. THE CONFLICT BETWEEN THE FIFTH AND NINTH CIRCUIT COURTS OF APPEALS OVER WHETHER *FORUM NON CONVENIENS* WAS AVAILABLE UNDER THE PRIOR WARSAW CONVENTION CONTINUES TO PRESENT A CONFLICT FOR CLAIMS BROUGHT UNDER THE CURRENT MONTREAL CONVENTION

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Art. VI, cl. 2, U.S. Constitution.

Although the doctrine of *FNC* has generated numerous decisions from this Court,[2] its application to an international treaty such as the Montreal Convention remains unsettled. When this Court has addressed the Warsaw Convention,[3] as the precursor to the Montreal Convention,[4] it has sought to ascribe to it a, "meaning consistent with the shared expectations of the contracting parties." *El Al Airlines, v. Tseng*, 525 U.S. 155 (1999).

The Ninth Circuit has also recognized that, "The Supreme Court repeatedly has counseled against adopting an interpretation of the [Warsaw] Convention that would have been discordant or offensive to the majority of signatories". *Hosaka*, 305 F.3d at 998 (9th Cir. 2002), *cert. denied*, 537 U.S. 1227 (2003) (citing *Floyd, supra*; and *Zicherman, supra)*. But, the interpretation urged by Respondents and given by the Eleventh Circuit Court in the instant case is discordant with the Montreal Convention, just as the same interpretation was determined to offend the majority of the signatories to the Warsaw Convention. *See Milor v. British Airways*, [1996] Q.B. 702, 706

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[2] *See e.g., Sinochem, infra; Ruhrgas, infra; Gulf Oil v. Gilbert*, 330 U.S. 501 (1947); *American Dredging, supra*; and *Piper v. Reyno*, 454 U.S. 235 (1981).

[3] *See also Olympic Airways v. Husain*, 540 U.S. 644 (2004); *Zicherman v. KAL, Ltd.*, 516 U.S. 217 (1996); *Eastern Airlines, v. Floyd*, 499 U.S. 530 (1991) (cases cited); and *TWA, Inc. v. Franklin Mint*, 466 U.S. 243 (1984).

[4] The Montreal Convention was intended to "harmonize the hodgepodge of supplementary amendments and intercarrier agreements" which comprised the Warsaw Convention. *Ehrlich v. American Airlines*, 360 F.3d 366 (2d Cir. 2004).

(Eng.C.A.) ("I think it would be surprising if the high contracting parties had preserved to that small minority of countries which applied the doctrine of *FNC* a power to affect the choice of the forum in which a dispute should be tried by a process unknown to a majority of the parties"). Respondents' suggestion, as adopted by the Circuit Court, that the Montreal Convention is a 'new treaty' susceptible to new interpretation was likewise erroneous.

Article 28(2) of the Warsaw Convention, which provided that "Questions of procedure shall be governed by the law of the court to which the case is submitted", is the subject of an unsettled conflict between the Fifth and Ninth Circuits. *See Hosaka* and *In re Air Crash Disaster Near New Orleans, La., on July 9, 1982.*[5] The Fifth and Ninth Circuits disagree about whether Article 28(2) of the Warsaw Convention is ambiguous and

[5] Respondents claim that Petitioners mischaracterized *Hosaka* when they referred to it as the "only United States **appellate** decision to have interpreted the almost identical language contained" in Article 28(2) of the 1929 Warsaw Convention" citing several cases. (Opp. Brief, pp. 12-13.) Of the cases cited by Respondents, *In Re Aircrash New Orleans*, 883 F.2d 17 (5th Cir. 1989) did not result in an *FNC* dismissal, was vacated by *Pan American v. Lopez*, 490 U.S. 1032 (1989), and remanded. The remainder of the cases are inferior District Court decisions, none of which "applied forum non conveniens under the Warsaw Convention" to dismiss Warsaw Convention claims. (*Cf.* Opp. Brief, p. 13 fn. 9.) Perhaps Petitioners should have clarified that *Hosaka* remains the only Appellate decision to have interpreted Article 28(2) of the Warsaw Convention and to have not been vacated or the subject of adverse action by a reviewing Court. At most, Respondents' contention serves to solidify the necessity of this Court's review to resolve a pending conflict.

permits *FNC* dismissal. The Fifth Circuit, in holding that the Warsaw Convention permitted *FNC* challenge, reasoned that the "interests of the federal forum in self-regulation, in administrative independence, and in self-management" were more important than the uniformity which the Warsaw Convention attempted to accomplish. 821 F.2d at 1159. When the Ninth Circuit considered the language of Article 28(2) of the Warsaw Convention (which mirrors the language again utilized in Article 33(4) of the Montreal Convention) it recognized the absence of any text "on the availability of the doctrine of forum non conveniens". *Hosaka*, 305 F.3d 990. When the Warsaw Convention was drafted, *FNC* was not well established. *Id.* at 994-1003. When the Montreal Convention was negotiated, *FNC* was recognized but was still alien to many countries. *Id.* at 1003. So, the United States delegates proposed a draft of Article 33(4) which provided that, "Questions of procedure shall be governed by the law of the court seised of the case, including the doctrine of forum non conveniens or similar doctrines . . .", but ". . . the final version of the Montreal Convention did not include the proposed language". *Hosaka*, 305 F.3d at 1000.[6] Regardless of whether the inclusion of *FNC* language lacked sufficient support to make it to a vote, the Montreal

[6] After the United States failed to get *FNC* included into the Montreal Convention, the delegates to the Montreal Convention agreed 'to maintain the status quo', as Respondents acknowledge on page 16 of their Brief. If the signatories agreed to maintain the existing 'status quo' as to *FNC*, then there could be no change, and certainly no 'new treaty' from which the application of *FNC* could suddenly spring. This shows the defect in the 'new treaty' argument and the

Convention still carries on the Warsaw Convention's ambiguity which was never settled.

The Montreal Convention modernized the Warsaw System and shifted away from the Warsaw Conventions' goal of protecting the "fledgling" airline industry to favoring the passengers. *See Ehrlich*, 360 F.3d at 371, fn. 4; and *Floyd*, 499 U.S. at 546. Although Article 33(4) of the Montreal Convention, ("Questions of procedure shall be governed by the law of the court seised of the case"), was derived almost verbatim from Article 28(2) of the Warsaw Convention ("Questions of procedure shall be governed by the law of the court to which the case is submitted"), and although conflict remains between the Fifth and Ninth Circuits over whether an *FNC* challenge could interfere with a claimant's forum selection, the Eleventh Circuit has now weighed into that conflict as well. *See Pierre-Louis*, 584 F.3d at 1058. Despite the intent of the Montreal Convention to give passengers greater rights, Respondents urge an interpretation that would favor air carriers and their insurers by allowing the doctrine of *FNC* to interfere with the right of passengers to select the forum where they bring their claims. (Montreal Convention, Art. 33(1), Pet. at 2.) Regardless, the Circuit Court reasoned that because the applicable treaty is the Montreal Convention, which it considered a 'new treaty', and not the Warsaw Convention, it held that Article 33(4) of the Montreal Convention

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error of the District Court and the Circuit Court in concluding and affirming that the Montreal Convention, as a 'new treaty', spontaneously provided for the application of *FNC*. Further, such an interpretation creates a likely separation of powers problem.

unambiguously allows an *FNC* challenge despite *Hosaka* and the drafting history. *Pierre-Louis*, 584 F.3d at 1058 fn. 7.

The Montreal Convention should be construed consistent with the manner in which similar provisions of the Warsaw Convention were interpreted. As one District Court explained,

> "Though the Montreal Convention replaced the Warsaw Convention, it intentionally 'contain[ed] provisions which embrace similar language as the Warsaw Convention.' *Watts v. American Airlines*, 2007 WL 3019344, *2 (S.D.Ind. Oct. 10, 2007). This was done in an effort to avoid "a complete upheaval of the common law surrounding the Warsaw Convention." *Id.*

Yahya v. Yemen Airways, 2009 WL 3424192, *4 (E.D. Mich. 2009). This proposition is not new or novel, since "The Explanatory Note to the Montreal Convention states that 'it is expected' that the provision of Article 17 governing carrier liability for passenger injury and death will be 'construed consistently with the precedent developed under the Warsaw Convention and its related instruments.'" *Schaefer-Condulmari v. U.S. Airways*, 2009 WL 4729882 (E.D. Pa. 2009). Not surprisingly, United States courts have relied on interpretations of similar provisions in the Warsaw Convention when construing the Montreal Convention. *Booker v. BWIA Airways*, 307 Fed.Appx. 491 (2d Cir. 2009) (interpreting Warsaw Convention as precedent in Montreal Convention case); *Bassam v. American Airlines*, 287 Fed.Appx. 309, 313 (5th Cir. 2008) (recognizing importance of relying on cases interpreting War-

saw Convention in case governed by Montreal Convention); *Gustafson v. American Airlines*, 658 F.Supp.2d 276 (D. Mass. 2009) ("caselaw interpreting provisions of the Warsaw Convention applies to cases interpreting 'substantively similar' provisions of the Convention"); *Wea Farms v. American Airlines*, 2007 WL 1173077 *3 (S.D. Fla. 2007); *Baah v. Virgin Atlantic Airways*, 473 F.Supp.2d 591, 592-93 (S.D.N.Y. 2007) (interpreting Article 33(1) of the Montreal Convention consistent with interpretation of Article 33(4) of the Warsaw Convention); *Igwe v. Northwest Airlines*, 2007 WL 43811 *3 (S.D. Tex. 2007). The Warsaw Convention and the Montreal Convention have even been construed as *collectively* governing air travel. *Nobre v. American Airlines*, 2009 WL 5125976 (S.D. Fla. 2009). Despite the potential persuasive value of the Warsaw Convention cases, neither the Respondent nor the Circuit Court afford any regard to *Hosaka*, and instead disregard the relevant forum selection langiage which existed in the Warsaw Convention which was carried over into the Montreal Convention.

Since neither Article 28(2) of the Warsaw Convention nor Article 33(4) of the Montreal Convention make any reference to the availability of the "doctrine of forum non conveniens", and since the treaty language which the United States delegates proposed was never incorporated into the Montreal Convention, the Eleventh Circuit's decision continues to conflict with the Ninth Circuit over the proper interpretation of the at-issue, identical language found in the modernized version of this treaty. *Compare Latimer v. U.S.*, 223 U.S. 501 (1912) (Identical language in re-enacted statute given same meaning). When the

District Court interpreted the Montreal Convention as maintaining the *status quo* (App. at 82), and the *status quo* was the subject of an unsettled dispute, this conflict will continue to exist until it is resolved by this Court.

IV. THE COURT OF APPEALS' DECISION DIRECTLY CONFLICTS WITH THIS COURT'S PROHIBITION ON RESOLVING THE MERITS BEFORE RESOLVING THE PRELIMINARY ISSUES OF JURISDICTION AND VENUE

Petitioners do not dispute that pursuant to *Sinochem v. Malaysia Int'l. Shipping*, 549 U.S. 422 (2007) and *Ruhrgas AG v. Marathon Oil*, 526 U.S. 574 (1999), this Court allowed inferior Courts to resolve *FNC* challenges before establishing personal or subject matter jurisdiction in certain circumstances. What Respondents missed from *Sinochem* and *Ruhrgas* was that *FNC* is a threshold *venue* challenge which must be addressed before a Court entertains the merits of an action and before a litigant actively participates in or acts in some manner inconsistent with an intent to challenge venue. All that the District Court referred to Martinique was a trial on remaining damage issues. This alone reveals that the District Court addressed and resolved all other issues in the litigation but for damages. To then apply an *FNC* analysis which was limited to remaining damage issues no longer renders *FNC* a 'threshold venue challenge'. As to Respondents' stipulation to liability, they should not be able to litigate for a year until things look grim, stipulate to liability in the District Court, and then seek *FNC* dismissal as to the remaining damage issues. By stipulating

to liability in the District Court, Respondents accepted the District Court as the most adequate and convenient court to hear the merits of Petitioners' claims. Having done so, Respondents waived any remaining *FNC* venue challenge. *See: Manley v. Engram*, 755 F.2d 1463, 1468 (11th Cir. 1985). Respondents cannot on the one hand stipulate to the jurisdiction of a court while on the other hand, continue to challenge its' venue. Were this precedent to stand, American companies sued in their district where their home offices are maintained could simply litigate until their liability becomes indefensible, stipulate in the district court to liability and then challenge *FNC* so that they would get to export the damage determination to a foreign court. Respondents' argument that strict liability makes liability issues irrelevant is also misleading. Respondents argument would fail if Petitioners were required to prove an ordinary negligence action with liability and damage components. The fact that the Montreal Convention provides Petitioners with the additional protection of strict liability should not make it *easier* for Respondents to avoid responsibility for their actions by then seeking *FNC* dismissal to a foreign country by claiming that liability issues are irrelevant for *FNC* purposes.

CONCLUSION

Respondents urge this Court that there are no conflicts when there are conflicts that are ripe for adjudication, not only between Appellate Courts, but with prior decisions of this Court. For the foregoing reasons, the Petition for Writ of Certorari should be granted.

Respectfully submitted,

JORGE A. DUARTE
Counsel of Record
JORGE A. DUARTE, P.A.
5975 Sunset Drive, Suite 601
Miami, Florida 33143
(305) 358-2400

ANDREW T. TRAILOR
BRIAN H. POLLOCK
ANDREW T. TRAILOR, P.A.
8603 South Dixie Highway
Suite 303
Miami, Florida 33143
(305) 668-6090

Attorneys for Petitioners

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RECORD PRESS, INC., 229 West 36th Street, N.Y. 10018—26978—(212) 619-4949
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